IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PROCK STONE,
Petitioner,
vs.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.
No. 320.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF FOR PETITIONER.

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Respondent devotes the major portion of its brief to a constitutional question of jurisdiction which has been well established and frequently adjudicated by this Court in FELA cases. It is apparent that respondent has not fully explored the law with respect to this. Authority for this Court's jurisdiction in the case at bar and its right to review state court decisions under the FELA are so numerous and so recent that petitioner considers it strained optimism on respondent's part to expect this Court to

reverse the line of cases adhering to the principle. The treatment of this jurisdictional question is of minor importance to the real issues, and we treat it accordingly herein.

The real issues are stated in petitioner's application for certiorari and the brief which accompanied it (pp. 8-22, inclusive) (pp. 26, 27 and 28 of the brief). We briefly summarize those questions here:

1. Can the Missouri Supreme Court substitute its findings of fact for those of the jury?

2. Is the Missouri Supreme Court's opinion with respect to the negligent order in conflict with the opinion of this Court in Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, and the opinion of the Texas Court of Civil Appeals in the case of Gulf, Colorado & Santa Fe R. v. Waterhouse, 223 S. W. (2) 65 660?

3. Is the Missouri Supreme Court's decision and opinion in ruling, as a matter of law, that a safer method of work need not be followed in conflict with the decision and opinion of the First Circuit Court of Appeals in Boston & Me. R. v. Meech, 156 F. (2) 109?

STATEMENT.

Respondent has challenged the accuracy of petitioner's statement of the facts. Petitioner accepts this challenge and discusses the facts in the order followed by respondent in its brief at pages 1-3.

1. Respondent first challenges the inference drawn from the evidence that it had knowledge of the spike in the tie extending into the ground contained in petitioner's statement of the evidence. The evidence for such inference is as follows:

Dick Stoughton, the straw boss, testified that he had encountered several ties with spikes in them on the very "y'l where petitioner was injured (R. 93, 95); the section foreman, E. gene Slagle, testified that "they knew some-th.. g was holding it or it wouldn't pull so hard" (R. 106). This testimony from experienced railroad men, and the inference which the jury was entitled to draw from it, is sufficient for the jury to find that respondent knew, or should have known, that a spike was holding the tie and it certainly warrants the statement petitioner made.

2. Next respondent states that there is no evidence that the efforts of four men were required to pull a tie with a spike in it.

We direct the Court's attention to Record 97 where this question and answer appears:

> "Q. And two men without help from somebody on the end prying and somebody else can't pull out one of these ties with a spike in them, can they? A. No, it is awful hard."

We suggest that whether this is impeaching or not, the question and answer appears in the record, and it is a proper basis for a statement and certainly sufficient evidence from which the jury could find that four men were necessary to pull the tie. The above evidence is clear that it required **two** men pulling and the help of **another** man prying and the help of **somebody** else to remove such a tie; a total of **four** men.

3. Petitioner stated on page 3 that "despite the fact that defendant's straw boss knew it was awful hard, and two men could not pull it, and it required four men, he (the straw boss) ordered plaintiff to pull harder" (R. 12, 51, 52, 61). Contrary to respondent's statement that petitioner's attorneys will wish to correct this, we reiterate

this statement because it is supported by the evidence and a jury has a right and did find it as a fact.

In sub-paragraph (b) respondent says that the reference to "it required four men" is a reference to the number of men finally required to draw the stubborn tie. This is incorrect. We are not referring to the evidence that four men eventually pulled the tie in question, but to the evidence of Dick Stoughton that it ordinarily required four men to pull a stubborn tie with a spike in it (R. 97).

In sub-paragraph (c) respondent charges to be false the implication drawn from the evidence that only two men were employed in extracting the tie at the time Stone was injured. The implication is not false and is one the jury was entitled to make from all of the evidence.

The evidence showed that Stoughton (the straw boss) came to assist Stone and Fish in removing the tie, but the evidence is not clear that Stoughton was assisting at the precise time the petitioner gave the jerk. We direct the Court's attention to the testimony of Mr. Fish at Record 51, which is as follows:

> "Mr. Stone asked for more jack and we couldn't give it any more, had it high enough then, and so we doubled up and Dick come down with a bar and put it over the south rail and pried on the other end and bumped it as we jerked and it still wouldn't come. **So Prock and I give it a big jerk, that is when he quit and said he hurt his back.**" (Emphasis ours.)

While it is clear that Stoughton had assisted in the removal of the tie by hammering on it, it is not clear that he was hammering at the precise time the petitioner and Fish jerked the tie in response to Stoughton's order which resulted in Stone's injury. Would not the jury be justified from this evidence in finding that Stoughton had stopped prying prior to the time Fish and Stone gave the jerk

and that at the time Stone was hurt only he and Fish were pulling on this tie?

In addition to this, the testimony of Charles Hopkins at Record 61 implements the evidence that although Stoughton had been assisting in the removal of the tie by prying prior to the time Stone was hurt, he was not prying on it at the precise time Stone jerked it.

It is the province of the jury to take all of the evidence, not one particular statement, and draw all reasonable inferences and deductions from it. With this evidence in the record, we submit it is incorrect to say that a statement based on it is false.

4. Respondent challenges the statement at page 3 that there was sufficient evidence for the jury to find that only two men were pulling at the precise time Stone was hurt. Respondent says that this is untrue, because Stone himself testified contrariwise.

We heretofore stated that the evidence with respect to this was not clear, but we say that it is the jury's province to make this finding from all the evidence and particularly that evidence adduced from Mr. Fish and Mr. Hopkins (R. 51, 52, 61). This has been discussed in point 3 immediately above.

5. We stated that the evidence also showed that the straw boss (Stoughton) had encountered several ties with spikes in them on this particular "Y". Respondent charges the petitioner with using the pluperfect tense of the verb in order to imply that Stoughton had encountered several ties with spikes in them on the "Y" prior to the time Stone was hurt.

The jury could infer this from the evidence and we think it is more clearly established by the reluctant witness, Stoughton, when he stated that on two or three occa-

sions they encountered ties with spikes in them on the north "Y" and further stated that if Stone was hurt on the "Y" it was about the time of his injury that the ties with spikes in them were encountered (R. 93, 95). So, therefore, since Stone was injured and did not thereafter pull any other ties with spikes in them there is a reasonable inference that the ties with spikes in them, referred to by Stoughton, were encountered prior to the time of the fatal injury to Stone.

6. Respondent seeks to escape the binding effect of Eugene Slagle's testimony that "they knew something was holding the tie because it pulled so hard" (R. 106), because he was not present.

Petitioner states that it makes no difference whether Slagle was in the vicinity or not. The testimony referred to was given by Slagle and was based on his many years of railroad experience. If, from his experience, he could say that under the circumstances where the tie pulled so hard the men "knew something was holding the tie", then that knowledge on his part is binding on the respondent. If track men with experience should realize that a tie that pulls hard might have a spike in it, then that is sufficient evidence for the jury to infer knowledge on the part of the respondent and find that with that knowledge the respondent and its straw bosses should have foreseen that the petitioner might be injured as a result of his compliance with an order to pull harder.

Thus we submit that since the jury resolved the question of fact in petitioner's favor, we are entitled to take the most favorable view of it in the statement of facts here.

ARGUMENT.

A SUBMISSIBLE CASE.

Negligent Order.

The respondent raises a question in its brief with respect to the negligent order not decided by the Supreme Court of Missouri. It would not be necessary to reply to its argument except for the fact that it is misleading.

Respondent's argument on this point is premised upon a discussion of the instructions and what the jury found guided by them. However, the Missouri Supreme Court did not pass on the instructions but based its decision on the fact that no submissible case was made. In the third paragraph of the Missouri Supreme Court's opinion, it said that:

> "Defendant's first assignment is that the trial court erred in failing to sustain its motion for a directed verdict. As we have concluded that plaintiff did not make **a submissible case under the Act**, we need not rule the other matters briefed and argued here" (R. 125). (Emphasis ours.)

It is apparent that the question presented here is whether or not the evidence is sufficient to make a submissible case under the Federal Employers' Liability Act and not a question as to the propriety of the instructions or findings made pursuant thereto.

What the Missouri Supreme Court said was that there was not sufficient evidence to submit the case to the jury, but that a directed verdict should have been sustained. The trial court thought otherwise and submitted it to the jury. The jury found in favor of the plaintiff, but on review of the evidence by the Supreme Court of Missouri,

it substituted its inferences, deductions and conclusions from the evidence in order to reach its decision and judgment that the evidence was not sufficient to make a submissible case and that a directed verdict should have been sustained.

We pointed out in our brief the error in doing this, and there is no further necessity for reviewing the many decisions by this Court holding that where there is any evidence whatever from which a jury could draw inferences, even speculation to some degree, it must be submitted to the jury and not taken away by an appellate court.

We submit, therefore, that the respondent has missed the point entirely and has argued the sufficiency of the instructions given rather than the sufficiency of the evidence.

We submit that under the decision of this Court in Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, and under the decision of the Texas Court of Civil Appeals in the case of Gulf, Colorado & Santa Fe R. v. Waterhouse, 223 S. W. (2) 654, petitioner made a submissible case under the negligent order theory, and a directed verdict is not warranted.

Failure to Furnish Sufficient Help.

The Missouri Supreme Court said that there was not sufficient evidence to justify a submission of the question of sufficient help to the jury. Petitioner insists that there is sufficient evidence and that this Court has a right to review the Missouri Supreme Court's opinion and decision to determine whether or not there was sufficient evidence to warrant submitting it to the jury. In fact, it is charged with the duty of assuring the Act's authority in state courts, and when the state's jury system requires the court (Supreme Court of Missouri) to determine the sufficiency

of the evidence to support a finding of fact based on a federal statute, the correctness of its ruling is a federal question over which the Supreme Court of the United States has control. Brady v. Southern Ry., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

Respondent has further charged herein that three men and not two men were assisting in extricating the tie. It has already been shown in the discussion under the factual statement, point 3 (c), that the inference is that only two men were employed. The entire point with respect to the failure to furnish sufficient help has been thoroughly discussed in petitioner's original brief at pages 42-46.

Safer Method.

The argument of respondent with respect to this point is primarily one of law.

There is, however, one implication raised by respondent on page 22 of its brief which we wish to correct. Respondent contends that under petitioner's theory the safest method must be used, that is, an absolute safe method. The only thing that petitioner has said was that if a safer method were available, it should be used, and this is supported by the cases.

Respondent does not sufficiently distinguish the case of Boston & Me. R. v. Meech, 156 F. (2) 109, on which petitioner relies, but attempts to dismiss the matter by saying that it is confident that there is no authority which would dispense with the finding that the method used was not reasonably safe.

The Supreme Court of Missouri held that respondent was not required to use a safer method and that to require it to do so would set up higher standards than reasonable care (R. 136). This is in conflict with the decision of the

First Circuit Court of Appeals in the Meech case, supra, and both the evidence and the law were fully discussed by petitioner in his brief at pages 42-51.

In passing, we also refer this Court to the opinion of the District Court for the Eastern District of Pennsylvania in the case of Rothwell v. Pennsylvania R., 87 F. Supp. 706, l. c. 708, in which that court followed the Meech case and held that an instruction given to a jury to the effect that the failure to adopt a safer method, where it is available, **is evidence of negligence**, was not error, and the court said that the principle was well established in law.

THIS COURT HAS JURISDICTION.

The respondent has attempted to side step the real issues presented here by questioning the right of this Court to grant the relief sought for lack of jurisdiction. What respondent really wants this Court to do is to reverse a long line of prior decisions in which it has held that it has authority to review state appellate courts' actions in construing and deciding FELA cases.

The crux of respondent's entire argument advanced herein is that this Court has no constitutional authority to review the decision of the Missouri Supreme Court in the case at bar. It has based its argument on the premise that the right to a trial by jury under the Seventh Amendment to the Constitution of the United States is not applicable to state courts. Therefore, respondent argues, if a litigant in the state court of Missouri is not entitled to a jury trial as a matter of right under the Seventh Amendment, the United States Supreme Court has no authority to review an opinion and decision of the Missouri Supreme Court setting aside a jury verdict and taking that verdict away.

The judicial system of Missouri provides for jury trials to litigants in negligence cases [Constitution of Missouri, Article I, Section 22 (a)]. The courts of Missouri must accept suits brought under the FELA and accord to injured railroad workers the same rights afforded other litigants in negligence cases (45 U. S. C. A. 56; Miles v. Ill. Cent. RR., 315 U. S. 698, 62 S. Ct. 827). Since the Constitution of the State of Missouri gives litigants in FELA cases a right to a jury trial, it is immaterial whether or not that same right is given under the Seventh Amendment to the Constitution of the United States.

The crux of the problem then is whether this Court has the right to review the opinion and decision of the Missouri Supreme Court in the case at bar and not whether the Seventh Amendment guarantees a jury trial in state courts.

This Court has repeatedly held that it has a right to review the opinions of the state appellate courts deciding cases under the FELA to determine whether the evidence of negligence in the record is sufficient to justify a submission of the case to the jury. This Court has stated that not only is it authorized to do so, but it is charged with the duty to do so under the supremacy clause of the Constitution, Article VI. It has so held in many cases.

Brady v. Southern Ry., 320 U. S. 476, l. c. 479, 64 S. Ct. 232, 88 L. Ed. 239;

Dice v. Akron, Canton & Youngstown R., 72 S. Ct. 312 (decided February 4, 1952);

Ellis v. Union Pac. R., 329 U. S. 649, 67 S. Ct. 598;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;

Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Bailey v. Central Vermont R., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

Therefore, respondent's argument that this Court has no right to review state court opinions in FELA cases is not well taken.

Respondent's argument on pages 12 and 13 of its brief that the only function of the Supreme Court is to define negligence as used in the Federal Employers' Liability Act, but does not have authority to review the state court's rulings, deciding whether the facts are sufficient to constitute negligence, is specious in view of the decided cases mentioned above.

Furthermore, respondent's argument on page 13 of its brief is contradicting. Respondent has argued throughout that this Court has no right to review the action of a state appellate court in FELA cases with respect to the amount of evidence necessary to make a submissible case. Yet, we find that on page 13 of its brief it admits that if a finding is unsupported by credible evidence this Court is not bound to accept it, for such finding would be without due process of law. If this Court is not required to accept a finding unsupported by credible evidence and may review a state appellate court's decision, therefore, the contrary is certainly true. If the jury's verdict is supported by credible evidence this Court has a right to review the action of a state appellate court setting aside that verdict and substituting its own finding, deductions and conclusions which are not supported by the evidence.

On page 14 of its brief respondent argues that even if under Missouri's system of jurisprudence the appellate courts (in this instance the Supreme Court of Missouri) usurp the functions of the jury, it is a question of local procedure to be decided by the state judiciary, and further states that this Court is bound by the Missouri Supreme Court's findings of fact. It is apparent that respondent fails to take notice of the difference between substance and procedure. This Court has frequently held that the

rights accorded litigants under the FELA are substantive rights and not to be taken away. Respondent has also ignored your recent holding in the Dice case, supra, wherein an argument similar to the one at bar was advanced, and you held, l. c. 315, that:

> "* * * the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used."

We submit that in the Dice opinion you came close to holding that regardless of the system of jurisprudence established by the state under FELA cases tried in that jurisdiction, the litigant is entitled to a jury trial. This is a time when that rule can be crystallized.

Thus we submit that respondent's whole argument is based on a false premise and is not worthy of serious consideration. The right to a trial by jury is part and parcel of the FELA. If there is sufficient evidence to warrant the submission of a case to the jury and the jury makes an award in a litigant's favor, and if that verdict is taken away from him on review by a state appellate court, a litigant is not only entitled to have the Supreme Court of the United States review the decision of the state court under its right and duty provided by Article VI of the Constitution of the United States, but if such action by the state court were permitted to stand he is deprived of his property without due process of law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

We submit, therefore, that this Court not only has jurisdiction of this matter on the grounds of the sufficiency of the evidence to show negligence under the FELA, but in addition, it has the duty to review the opinion in the case at bar because of the disparity and conflict in the law as

announced by the Missouri Supreme Court with other federal and state decisions on the same questions under the FELA. They have been fully treated in petitioner's original brief (pp. 36-42).

We consider further argument on the jurisdictional point unnecessary.

CONCLUSION.

Petitioner respectfully submits that this Court has jurisdiction to entertain petitioner's action and that it has the constitutional duty under Article 6 to review the action of the Missouri Supreme Court in substituting its findings for those of the jury.

Petitioner further submits that the record evidence clearly justified a submission to the jury of the questions of the negligent order, the safer method and the sufficiency of the help furnished. The opinion of the Missouri Supreme Court is in conflict with and sets up rules of law in direct opposition to the holdings of the United States Supreme Court and the other state and federal courts construing rights afforded to railroad workers under the Federal Employers' Liability Act.

Wherefore, your petitioner prays this Court to reverse the decision of the Supreme Court of Missouri and reinstate the jury verdict.

Respectfully submitted,

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